

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSEPH W. VITT

Claimant

VS.

DANLIN INDUSTRIES CORP.

Respondent

AND

TRAVELERS INDEMNITY CO.

Insurance Carrier

Docket No. 1,043,209

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the February 20, 2012, Award entered by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on June 15, 2012. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Ali N. Marchant, of Wichita, Kansas, appeared for respondent.

The ALJ found that claimant met with personal injury by accident arising out of and in the course of his employment with respondent. The ALJ further found that claimant had a functional impairment of 10 percent to the body as a whole and that claimant was entitled to an award of permanent partial disability compensation based upon a work disability of 77.3 percent from April 1, 2008, to March 1, 2009; a 62.8 percent work disability from March 1, 2009, to July 13, 2009; a 62.8 percent work disability from July 13, 2009, to December 25, 2009; an 84.8 percent work disability from December 25, 2009, to July 26, 2010, and a 62.8 percent work disability from and after July 26, 2010.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent argues that claimant has failed to meet his burden of proving he met with personal injury by accident arising out of and in the course of his employment with respondent. Therefore, respondent asks the Board to reverse the ALJ's Award.

Claimant argues the evidence shows he suffered personal injury by accident that arose out of and in the course of his employment with respondent and the Award should be affirmed.

The issue for the Board's review is: Did claimant sustain personal injury by accident that arose out of and in the course of his employment with respondent?

FINDINGS OF FACT

Claimant was employed by respondent, a company that supplies chemicals for gas and oil wells, as a set up man. As part of his job, he would open (frac) a well, put in new fittings, put a hose down the well, and get the well ready to receive the chemicals. On or about November 1, 2007, claimant was sent out to set up some wells. During the set-up, he was on his hands and knees working with pipe wrenches breaking the wells open, and hydrogen sulfide gas leaked out of three separate wells. At each of those three wells, he was exposed to high volumes of hydrogen sulfide gas, which he was forced to inhale. At each of those three wells, he became disoriented and experienced shortness of breath. Claimant said he was wearing a detection device on his belt called a rattler which detected hydrogen sulfide, and the rattler went off at each of the three wells. Claimant said the rattler showed that his exposures were from 300 to 600 parts per million (ppm).

Claimant said that after this exposure to hydrogen sulfide, he went someplace and was given oxygen to help his lungs.¹ He was on oxygen for about two hours. Nevertheless, claimant said he was still experiencing symptoms after receiving the oxygen. He did not miss any work because of his exposure.

About two or three weeks after claimant's first exposure to the hydrogen sulfide, claimant was again out in the field when his rattler went off. Claimant was again exposed to hydrogen sulfide. He said during this second date of exposure, he experienced dissociation, general malaise, headaches, a severe backache, and respiratory difficulties. Claimant then reported his exposure to his supervisor, who filled out accident reports. Respondent, however, did not send claimant to a physician, and claimant went home to try to heal himself. Claimant's condition, however, worsened, and he called his sister and she took him to the emergency room. There, claimant was put on 100 percent oxygen.

¹ Claimant's hospital records indicate claimant sought treatment at Emergency Medical Services the same day as the exposure. Claimant testified that sometime between the first and second exposures he went somewhere and was put on oxygen.

He was hospitalized overnight, but left the hospital early the next morning so he could return to work.

The History and Physical/Discharge Summary of claimant's hospitalization at Labette Health Center from November 7, 2007, to November 8, 2007, describes that claimant had an initial exposure three weeks earlier and had driven to Emergency Medical Services, where he was given oxygen for two hours. The hospital report indicates that claimant had two exposures, one of which was in close conjunction to the date of his hospitalization at Labette Health Center. The records from Labette Health Center indicate that claimant's discharge diagnoses were:

- 1) Hydrogen sulfide toxicity. Past exposure 3 weeks ago with >600 ppm.
- 2) Recent exposure today with 100 ppm.
- 3) Neurologic complications.
- 4) Pneumonitis, chemical from 1.²

Claimant continued to work for respondent, doing the same job. Although he was exposed to the chemicals he worked with, he was not again exposed to hydrogen sulfide. Claimant said he still worked outside and was exposed to dust and fumes. He testified that he had difficulty performing the job after his exposures to hydrogen sulfide, but he was trying to keep his job. Claimant said his production was down, but he did not tell his supervisor or anyone at respondent that he was having difficulties with his job. Claimant said he was laid off in April 2008. His last day of work was March 14, 2008.

Claimant filed an Application for Hearing on November 26, 2008, claiming he was injured "[e]ach and every working day beginning November 2007 and continuing until the last date worked." caused by "[c]hemical and gas exposure performing duties of a laborer maintaining oil wells."³ He claims injury to his "hands, arms, legs, central nervous system, pulmonary system, and all other parts of the body affected."⁴

Dr. Thomas Beller is board certified in internal medicine with subspecialties in pulmonary medicine and ABIM critical care. He is a certified independent medical examiner. Dr. Beller was asked by respondent's insurance carrier to review claimant's hospital record and render an opinion as to whether claimant's symptoms were consistent with exposure to hydrogen sulfide. The email from the insurance carrier indicated that claimant "sought his initial medical attention three weeks after the alleged hydrogen sulfide

² Beller Depo., Ex. 4 at 4.

³ Form K-WC E-1, Application for Hearing filed November 26, 2008.

⁴ *Id.*

exposure occurred.”⁵ The only medical record provided to Dr. Beller was the History and Physical/Discharge Summary from claimant’s November 7, 2007, hospitalization.

After reviewing the hospital record, Dr. Beller issued a report dated April 23, 2008, regarding his impressions. Dr. Beller opined that the type of symptoms claimant was having seemed inconsistent with the high level of hydrogen sulfide exposure he described. The hospital record indicated claimant had been exposed to hydrogen sulfide levels of 600 ppm for about five minutes, which Dr Beller said was a “near lethal” exposure.⁶ Dr. Beller indicated that level of exposure could be associated with the development of fluid on the lungs, pulmonary edema, respiratory failure, and can be rapidly followed, within a few minutes, by death. Dr. Beller said claimant did not present for his medical evaluation until three weeks after the exposure, which would be inconsistent with the type of exposure he described. Dr. Beller also said that symptoms from exposure to hydrogen sulfide as were reported by claimant would usually last a short time, and he would not expect claimant to have any prolonged or long-term effects from the exposure.

Dr. Beller said that it is possible for a person to develop asthma or reactive airway disease as an adult spontaneously without it being caused by any kind of specific exposure. He stated that asthma can occur at any age and sometimes develops without a known cause.

Dr. Beller acknowledged that he did not examine claimant and had never spoken with claimant, nor had he reviewed any of claimant’s testimony. Dr. Beller did not know if claimant was down in a hole, on a platform, in a building or out in an oil field when he was exposed. He acknowledged he did not have all the details about how long claimant’s sensor was registering, at what level, where claimant was when it happened, or if claimant was reading the sensor correctly. He did not know what treatment claimant received or claimant’s current condition. Dr. Beller stated that if he had additional information to review, he might have a different assessment.

Dr. Gerald Kerby is board certified in internal medicine with a subspecialty in pulmonary disease. He is a professor of medicine at KUMC and treats patients as well. He also performs independent medical examinations in workers compensation cases. In that regard, at the request of the ALJ, he examined claimant on April 22, 2009, regarding a work injury with a date of accident beginning in November 2007 and ending his last date of employment.

Claimant told Dr. Kerby that in late October or early November 2007, while working in oil field maintenance, he was exposed on several occasions to hydrogen sulfide gas. On the first of those occasions, claimant was exposed to several wells. On one of the

⁵ Beller Depo., Ex. 3.

⁶ Beller Depo. at 6.

wells, his detection device showed a level of hydrogen sulfide of approximately 300 ppm and another at 600 ppm. Claimant developed difficulty in ambulating, become dissociated and developed respiratory symptoms. Two or three weeks later, claimant was again exposed. The second time his detection device showed an exposure of approximately 300 ppm. He had symptoms of a feeling of dissociation, general malaise, headache, backache, and respiratory difficulties. After claimant's second exposure, he was seen at Labette Health Center, where he was treated with 100 percent oxygen.

Claimant complained to Dr. Kerby that he currently had an increase in shortness of breath and a nonproductive cough. His cough is worsened with exposure to smoke, fumes, cold air or other respiratory irritants. Dr. Kerby's physical examination of claimant was normal, but the pulmonary function tests revealed that claimant had a mild decrease in lung capacity and a marked response to methacholine, indicating a moderate to severe degree of bronchial hyperreactivity. Dr. Kerby said the tests show that claimant sustained an airway injury resulting in irritant induced asthma. In other words, claimant had reactive airway disease caused by exposure to an inhaled irritant. Dr. Kerby opined that claimant's condition was caused by his exposures to hydrogen sulfide. Using the *AMA Guides*, Dr. Kerby placed claimant in Class 2 for a 10 percent functional impairment.

Dr. Kerby said claimant could probably tolerate a mild degree of physical activity if it was in an environment free of dust, fumes, smoke, respiratory irritants, or extremes of temperature. Dr. Kerby said he believed claimant is able to engage in employment within the restrictions he outlined. Dr. Kerby reviewed the task list prepared by Karen Terrill⁷ and of the 46 tasks on the list, opined that claimant would be unable to perform 33 for a 72 percent task loss. Dr. Kerby reviewed the task list prepared by Steve Benjamin.⁸ Of the 67 tasks on the list, he opined that claimant is unable to perform 45 for a 67.2 percent task loss.

Dr. Kerby has continued to treat claimant since he saw him on April 9, 2009. The last time he saw claimant was January 13, 2010. At that time, claimant had been on medication and his symptoms were under fair control. Dr. Kerby believed claimant would benefit from ongoing medical care in the form of inhaled corticosteroids and short and long-acting bronchodilators. Most likely, claimant would be on this medication permanently.

After claimant was laid off in April 2008, he was unemployed until March 2009. During that time, he tried to make some money as a handyman, and he did some roof repair and remodeling work. He said he might have made as much as \$200 per week, but

⁷ At the request of claimant's attorney, Karen Terrill, a rehabilitation consultant, interviewed claimant via telephone on August 31, 2010. Using information provided by claimant, Ms. Terrill compiled a list of 46 tasks claimant had performed in the 15-year period before his accidental injuries at respondent.

⁸ At the request of respondent, Steve Benjamin, a vocational rehabilitation consultant, interviewed claimant by phone on May 20, 2011, and made a list of 67 separate tasks that claimant had performed in the 15-year period before his accidents.

his average was about \$150 per week. Claimant next found work at Asplundh Tree Service. There, he chipped trees, dragged limbs and cleaned up. He made \$10 per hour and worked a 40-hour week. There was no overtime and no fringe benefits. From July 13, 2009, to December 25, 2009, claimant worked in resident care at Parsons State Hospital. He made \$10.68 an hour and worked a 40-hour week with no overtime. Claimant said the job was in a smoke-free, dust-free environment. Claimant was a temporary employee and was limited to working 999 hours, so he was laid off in December 2009. From December 25, 2009, through July 5, 2010, claimant was unemployed. He went back to work, again in resident care, at the Parsons State Hospital on July 6, 2010. He continued working there until February of 2011 when he was again laid off. Claimant does not know if he will be called back. He has been looking for other work but has been unable to find anything.

PRINCIPLES OF LAW

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁹ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.¹⁰

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which

⁹ K.S.A. 2007 Supp. 44-501(a).

¹⁰ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

the accident occurred and means the injury happened while the worker was at work in the employer's service.¹¹

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

ANALYSIS

Claimant alleges injury due to accidental exposures to chemicals at work. Specifically, claimant relates two instances where he inhaled hydrogen sulfide gas. Following both exposures, claimant was treated and released—the first time after a few hours at Emergency Medical Services and the second time after an overnight admission at the emergency room of Labette Health Center.

The record contains opinion testimony from two medical experts. Dr. Beller, who never examined claimant and who had an incomplete history of claimant's treatment, opined that claimant's condition was most likely not due to an occupational exposure to hydrogen sulfide. He reached this conclusion, in part, based upon an inaccurate belief that claimant did not seek medical treatment until weeks after his initial exposure.

Dr. Kerby, conversely, did examine claimant and was given a more complete and accurate history of claimant's exposures, symptoms and treatment. He diagnosed claimant with irritant induced asthma, which was caused by the exposures to an inhaled irritant, specifically the hydrogen sulfide at claimant's work. He rated claimant's impairment and

¹¹ *Id.* at 278.

gave restrictions. Based on those restrictions, Dr. Kerby also gave his opinion as to claimant's task loss using the two task lists prepared by the two vocational experts. Like the ALJ, the Board finds, in this instance, that the opinions of Dr. Kerby are more reliable and credible than those of Dr. Beller. The Board adopts the findings and conclusions of the ALJ as set forth in the Award.

CONCLUSION

Claimant sustained personal injury by accident that arose out of and in the course of his employment with respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated February 20, 2012, is affirmed.¹²

IT IS SO ORDERED.

Dated this _____ day of June, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
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Ali N. Marchant, Attorney for Respondent and its Insurance Carrier
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Thomas Klein, Administrative Law Judge

¹² The Board notes that the ALJ, in calculating the Award, did not include claimant's 10 percent functional award, which would have run from December 23, 2007, through March 31, 2008. However, since the entire Award was ordered paid in a lump sum, the result is the same and the Board will not recalculate the Award.